No. 84-312

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE SYNAGOGUE COUNCIL OF AMERICA AND THE UNION OF AMERICAN HEBREW CONGREGATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Question Presented

Whether since-rescinded Federal regulations, which excluded from the Combined Federal Campaign certain charitable organizations solely because those organizations use litigation to achieve their health and welfare purposes, are consistent with the First and Fifth Amendments.

Statement of Interest

The American Jewish Committee, The National Council of Jewish Women, The Synagogue Council of America and The Union of American Hebrew Congregations, as *amici curiae*, respectfully submit this Brief supporting affirmance of the decision below. The Brief was prepared by the American Jewish Committee.

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members founded in 1906, believes that the defense of the civil rights and civil liberties of American Jews may best be accomplished by safeguarding the civil rights and civil liberties of Americans generally. AJC is committed to the belief that full protection of the First Amendment rights of all Americans, including their right of access to the courts, and to the forums created by their Government, is essential to the preservation of the pluralistic values which are an integral part of this nation's constitutional framework.

The National Council of Jewish Women ("NCJW"), the oldest major Jewish women's organization in the United States, expresses its commitment to advancing

human welfare through the activities of volunteers engaged in a multi-facted, coordinated program of education, advocacy and service. It believes a pluralistic democratic society is dependent upon the collective efforts of the public and private sectors and is strengthened by the commitment and contribution of volunteers and the nonprofit sector. NCJW opposes denial of access by potential contributors to health and welfare organizations which advocate and litigate on behalf of the public good.

The Synagogue Council of America ("SCA") is a national Jewish organization which includes within its membership the three national rabbinic organizations of Reform, Conservative and Orthodox Judaism and the three national congregational organizations of Reform, Conservative and Orthodox Judaism. SCA desires to preserve the right of charitable organizations and those concerned with the public interest to use all legal means to press their concerns. In the opinion of SCA, although there may be legitimate standards which could be applied in regulating which organizations may participate in the Combined Federal Campaign, reference to whether or not a particular organization uses the court system to achieve its objectives is not such a legitimate standard.

The Union of American Hebrew Congregations ("UAHC") is the parent congregational body of Reform Judaism, serving 783 synagogues throughout the United States and Canada, with a membership of approximately one million persons. UAHC has long been dedicated to the promotion of equality in all aspects of American life, and believes that fair and equitable treatment should be afforded health and welfare organizations which utilize litigation to achieve their purposes.

To the best of their knowledge, none of *amici* are participants in the Combined Federal Campaign.

In the view of *amici,* the Combined Federal Campaign should properly be viewed as a limited public forum and the appropriate standards of review applied to the regulation of access to that forum. Denial of access to such a governmental limited public forum by reference to a content-based distinction should be permitted only in the light of a scrutiny which incorporates the "special constitutional solicitude" which is mandated whenever freedom of expression is regulated. *Amici* further believe that whether the Combined Federal Campaign is viewed as a public or a nonpublic forum, the Government has not made a sufficient showing to overcome the First Amendment interests implicated when, as here, a distinction is made among participants in such a governmental forum based on the content of the communications proposed to be made by those participants. This is especially so when, as here, the content-based differential treatment explicitly excludes from participation those charitable, health and welfare organizations that engage in the legitimate and constitutionally-protected utilization of their right of access to the courts, and thus impermissibly burdens that protected activity.

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This Brief is submitted with the consent of the parties. The original letters reflecting the granting of such consent are being filed with the Clerk of this Court.

Statement of the Case

Amici incorporate by reference the Statement of the Case set forth in the Brief to be filed by respondent. The Opinion of the Court of Appeals is reported at 727 F.2d 1247 (D.C. Cir. 1984). The Opinion of the District Court is reported at 567 F. Supp. 401 (D.D.C. 1983).

Summary of Argument

The Combined Federal Campaign (the "CFC") should properly be viewed as a limited public forum (i.e., public property which may not ordinarily constitute a public forum but which has been opened, at least temporarily and for certain purposes, for use by the public as a place for expressive activities) under the tripartite classification enunciated in *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983). As the exclusive vehicle for charitable solicitation of Federal employees at their workplaces, the CFC cannot reasonably be said to be a nonpublic forum.

The courts below each properly found that the charitable organizations which the Government had accepted for participation in the CFC share with the respondents, who were barred from such participation under the challenged regulation, a common status as organizations which provide "health and welfare services." The courts below further properly found that the Government's refusal to allow respondents access to the CFC solely on the grounds that they utilize litigation to achieve their health and welfare purposes constituted a content-based distinction. The Government has not shown a compelling state interest which is sufficient to overcome the First Amendment interests implicated when it restricts the access of certain charitable, health and welfare organizations to a limited public forum based upon the content of their proposed communications.

Moreover, even were the Court to find that the CFC is a nonpublic forum the challenged regulations would constitute a violation of the First and Fifth Amendments in that they invidiously discriminate among various health and welfare organizations. The governmental purpose served by the CFC (provision of a means for the Government to cooperate with and assist voluntary health and welfare organizations in soliciting funds from Federal personnel) has nothing to do with the means utilized by these various organizations to achieve their health and welfare purposes, particularly when the basis for the distinction between the barred organizations and those accepted for participation in the CFC is the former organizations' utilization of the legitimate and constitutionally-protected activity of litigation in order to achieve those purposes. Whether respondents' access to the CFC is viewed as a right or as, improbably, a benefit, it is simply improper for the Government to deny access thereto by reference to respondents' exercise of a constitutionally privileged means of expression.

ARGUMENT

The Challenged Federal Regulations' Denial of Access to the Combined Federal Campaign to Certain Health and Welfare Organizations Solely Because Those Organizations Utilize Litigation to Achieve Their Purposes Violates the First and Fifth Amendments.

On February 10, 1983, President Reagan issued Executive Order No. 12404, 3 C.F.R. 151, which established the criteria as to which charitable organizations are eligible to participate in the Combined Federal Campaign (the "CFC"). That Executive Order, which amended Executive Order No. 12353 of March 23, 1982 (the prior Executive Order setting forth the applicable criteria for participation in the CFC), provided, in pertinent part, that:

> . . . [E]ligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. . . . Such services must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.
>
> . . . Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign.

This Brief demonstrates that the since-rescinded CFC eligibility criteria, enacted as regulations, 5 C.F.R. Pt. 950, pursuant to Executive Order No. 12404, barring participation in the CFC by "legal defense funds" (i.e., non-profit organizations which provide legal services to clients on the basis of whether or not the clients have a cause, claim or defense that the organization wishes to advance), should be subjected to strict scrutiny in order to determine whether they constitute a sufficiently narrow restriction in the service of a compelling government interest. They should not merely be examined as to whether they bear a reasonable relationship to a legitimate government interest. This conclusion arises out of two analytically distinct bases:

> (i) The CFC is a limited public forum, and the challenged regulations' reference to the means utilized by legal defense funds in achieving their health and welfare objectives is a content-based distinction. As such the challenged regulations are subject to strict scrutiny.
>
> (ii) The challenged regulations specifically differentiate among charitable, health and welfare organizations on the basis of whether they engage in the legitimate and constitutionally-protected activity of litigation. Even if, *arguendo*, the CFC is not a limited public forum, the utilization of the suspect criterion would require strict scrutiny in order to protect respondents' rights under the First and Fifth Amendments.

It is submitted that, once strict scrutiny is applied, the challenged regulations must be held unconstitutional.

I. The Combined Federal Campaign Is a Limited Public Forum, and the Regulations Denying Respondents Access Thereto Are Inconsistent With the First Amendment.

In *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983) ("*Perry*"), the Court held that the extent to which the First Amendment protects access to government property is dependent upon the nature of that property:

> (i) In "traditional public forums", such as parks and streets, the Government may not prohibit communicative activity, and, while permitted to enact reasonable time, place and manner regulations, may enforce content-based regulations and/or exclusions with respect to those forums only if those regulations are necessary to serve a compelling state interest and are narrowly drawn to achieve that end. *Id.* at 45.
>
> (ii) In "limited public forums" (i.e., government property that, while not of a historically open character, has been opened to the public as a place for at least certain communicative activity) the Government, while having no obligation to indefinitely maintain the public nature of such facilities, "as long as it does so . . . [,is] bound by the same standards as apply in a traditional public forum." *Id.* at 45-6.
>
> (iii) In what have come to be termed "nonpublic forums" (i.e., government property that is not considered a "forum for public communication," either by tradition or by designation), the Government may, in addition to the reasonable time, place and manner regulations permitted with respect to a public forum, selectively deny access in order to "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

While the Government argues that the CFC "clearly falls within the nonpublic forum category" (Pet. Brief at 23), it is submitted that the CFC should properly be viewed as a limited public forum under the *Perry* tripartite classification.

The CFC has, since 1961, been the only means by which charities may solicit federal civilian and military personnel at their workplaces. As the petitioner himself testified in March 1983 before a Congressional Subcommittee on Manpower and Housing, however, "charity appeals in the Federal workplace did not begin" with the CFC. (J.A. 308). Already well prior to 1961, voluntary health and welfare agencies were permitted to make extensive and multiple appeals to Federal employees, with only rudimentary regulation.

As the petitioner's 1983 testimony further reflects, the statement of purported objectives set forth in Executive Order No. 12404 (objectives that are now relied upon by petitioner in barring respondents from participation in the CFC), was not enacted until more than twenty years after creation of the CFC—and only after the courts had found that prior regulations governing the CFC, which also barred respondents, were constitutionally deficient. (J.A. 313). That *post hoc* statement of objectives provides that:

> The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that

> such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare.

Executive Order No. 12404. However, neither the Government's enactment of the challenged regulations, nor the *post hoc* statement of objectives which accompanied Executive Order No. 12404, can change the CFC's fundamental nature.

The right of charitable organizations generally to engage in the "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes," all of which is inextricably tied in with the act of solicitation, is protected by the First Amendment. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). While the Federal workplace is, concededly, not a traditional public forum, the Government, in setting aside a portion of that workplace at a particular time each year in order to enable charitable organizations to solicit from Federal workers, seems plainly to have provided an extension into that forum of an opportunity for charities to exercise their First Amendment rights. That the permitted solicitation consists, in each case, only of a 30-word statement, which the Government argues is subject to editing and approval by government employees, and is included in leaflets which are distributed by government employees during a specified period,[1]

1. Respondents assert, and the court below has found, that the Government has not exercised as much control over the text and distribution of the solicitation materials as petitioner has claimed. However, even if the Government's version of this matter is accepted, the above analysis would still apply.

does not, as the Government has suggested, deprive that communication of its status as an expressive activity worthy of First Amendment protection.

Charitable solicitations, like other expressions protected by the First Amendment, are subject to reasonable time, place and manner restrictions, *see, e.g., Heffron* v. *Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981), which restrictions are permissible "so long as they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest and . . . in doing so . . . leave open ample alternative channels for communication of the information." *Id.* at 648, *quoting Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). When the Government opens up the Federal workplace to charitable solicitations, the peculiar needs of that forum may mandate time, place and manner regulations pursuant to which a solicitation must be made in a particularly rigorous format. However, that ability to set appropriate regulations should not be "bootstrapped" into the dubious proposition that no First Amendment rights are involved at all, or the equally questionable proposition that, in making such time, place and manner regulations, the Government may allow certain charities access to the workplace, and others sharing a common status no such access at all.

Nor is the Government's comparison of the CFC to several facilities which the Court has found to be nonpublic forums well-placed. In each of those cases (*United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (postal mailboxes); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S.

119 (1977) (prisons); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (prisons); *Greer* v. *Spock*, 424 U.S. 828 (1976) (military bases); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (municipal transporation systems); and *Perry* (internal school mailing system)), the Court's holding that a forum was "nonpublic" was premised either on a finding that the exercise of First Amendment rights would be disruptive of the proper functioning of the governmental activity at that property (*Greenburgh; Jones; Adderley; Greer; Perry*) or, in the context of the particular forum involved, would impose on a "captive audience" a viewpoint that that audience might find objectionable (*Lehman*). However, the Government, by the very act of opening up its facilities to charitable organizations has determined that such solicitations, at least in the organized form represented by the CFC, is *not* disruptive of the workplace; nor may this case be compared to *Lehman*, since it could hardly be said that Federal employees are "captive audiences" of brief,, written solicitations which they are free to deposit in the wastebasket.

For the Government to point to the above-mentioned cases as evidence that the Court need not provide access to the CFC which is appropriate to a limited public forum begs the question that must be considered: whether in *this* instance the Government has given an otherwise "nonpublic" forum the open character, at least for a particular subject matter, that is associated with a public forum. These cases stand for the proposition that the allowance of selective access to a facility may not *necessarily* transform a facility into a limited public forum. However, the Court must still consider whether the allowance of access

to the CFC has not opened that facility "as a place for expressive activity," at least for certain groups or for the discussion of certain subjects. Thus, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), a state university, which was otherwise a nonpublic forum, became a limited public forum by reason of the Government's action in opening up that university's facilities for meetings of student groups.

Perry supports the conclusion that the CFC is a limited public forum. In that case, the Court, in holding that the school's internal mailing system was a nonpublic forum and that the school was entitled to permit access thereto to the recognized bargaining representative, while denying such access to a rival union, stated that "[*w*]*hen* government property is not dedicated to open communication the government may . . . restrict use to those who participate in the forum's official business." *Id.* at 52 (emphasis supplied). Thus, in *Perry*, the Court found that the recognized bargaining representative had official duties distinguishable from those of the plaintiff and that the exclusive access policy was closely tailored to the official responsibilities of that representative. *Id.* at 53 n.13. It is evident, however, that determination of whether a particular forum is (or is not) one that has been "dedicated to open communication," must be made on the basis of various factors—one of which, the holding of *Perry* logically suggests, is whether the forum has been opened to those who do *not* "participate in the forum's official business."

Significantly, while the Court held in *Perry* that the school's internal mail system was not a public forum with

respect to the general public, including the plaintiff union, the Court left open the possibility that the school might be deemed a "limited public forum" for organizations comparable to the "YMCA, Cub Scouts, and other civic and church organizations" which were allowed access to the school's internal mail facilities. The Court stated:

> Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as [the plaintiff union], which is concerned with the terms and conditions of teacher employment.

Id. at 48. Thus, implicit in *Perry's* reasoning is the notion that the granting to certain types of organizations of access to governmental facilities, where those organizations do not have a clear official function, may create a "limited public forum" to which entities of similar character have similar rights of access. Moreover, since First Amendment rights are involved, the Court must not take at face value a governmental assertion that a particular communicative activity does constitute a portion of the forum's official business and therefore gives rise to no rights of access on behalf of other parties. Otherwise, the Government might, by a self-serving statement, transform a limited public forum into a nonpublic forum.

In light of the foregoing, it is submitted that the CFC is a limited public forum. As discussed above, charitable

organizations have, since long before the creation of the CFC, been permitted access to Federal workers for solicitation purposes. At no time prior to the issuance of Executive Order No. 12404 was it suggested that the CFC was intended to "lessen the burdens of government and local communities," as is now set forth in that Order, nor was it suggested that the CFC otherwise fulfills an official function of the various governmental agencies at which solicitations were made. Rather, as reflected in the *Manual on Fund-Raising Within the Federal Service* (the "*Manual*"), the CFC's stated objective was "to cooperate with and assist voluntary health and welfare agencies in soliciting funds for worthy causes from Federal personnel." *Manual* at 1. Thus, the forum was created to grant access to Federal offices which were of an historically non-open character for certain communicative activity—the very definition of a limited public forum. In allowing charities to solicit in the Government workplace through the CFC, the Government—as a District Court found in a decision not appealed by the Government—furnished, in effect, "a billboard or channel of communication through which organizations can disseminate their appeals to federal workers." *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365, 1367 (D.D.C. 1981).

While the Government has no obligation indefinitely to maintain a limited public forum once it is created, it would empty the classification of any meaning to suggest that the Government could transform such a forum into a nonpublic forum by the simple act of enunciating a new set of objectives once it was found by a court that, under the objectives and regulations previously promulgated, the

Government had created a limited public forum—especially when the Government all the while maintained essentially the same set of regulations and continued to allow access to that forum by essentially the same group of entities as were permitted access until the court struck down the earlier provisions. This is, in essence, what, post-*Campbell*, the Government sought to do by enacting Executive Order No. 12404 and the challenged regulations.

As a limited public forum, then, access to the CFC is subject to the "special constitutional solicitude" which the protection of First Amendment rights demands. *Widmar*, 454 U.S. at 276. *Perry* clearly asserts that, while the government may limit access to a limited public forum to "entities of similar character," it may not discriminate among "similar" groups on the basis of the content of their proposed messages. 460 U.S. at 48. The District Court herein properly found, and the Court of Appeals properly affirmed, that the focus of the challenged regulations on the litigation activity in which the legal defense funds were engaged, as a basis for exclusion of those organizations, was content-based: "As the 'expression' protected under the First Amendment in an act of charitable solicitation is a request for contributions, the 'content' of that expression is the accompanying statement of how these contributions will be used." 567 F. Supp. at 407. As the Court of Appeals herein reasoned, the challenged ". . . differential treatment of like entities raises the serious possibility that a speaker, or class of speakers, has been excluded from a forum, not in furtherance of a legitimate interest of the

Government, but instead simply because the speaker ha[d] been viewed disfavorably by the Government." 727 F.2d at 1259.

The Government asserts that the respondents are not similarly situated with the organizations to whom access to the CFC was granted, save perhaps that both groups are charitable organizations within the meaning of section 501(c)(3) of the tax code, and suggests that the decision below should be understood as mandating access to the CFC by all section 501(c)(3) organizations. That is not the case.

The record demonstrates that the litigation efforts of respondent NAACP Legal Defense and Educational Fund have resulted in *direct* benefits to hundreds of thousands of persons, "such as income supplementation in the form of back pay and future earnings, better educations, improved health care, better housing and other living conditions, humane conditions of incarceration and, in the case of our capital punishment program, life itself." (J.A. 121-2). Similarly, there is no dispute that through the litigation activities of respondent Puerto Rican Legal Defense and Education Fund, Inc. "large numbers of *identifiable individuals* have secured the opportunity to obtain or retain employment, have been afforded new and improved housing accommodations and have received increased access to improved bilingual education and increased access to government benefits." (J.A. 237, emphasis supplied). A review of the affidavits submitted on behalf of the other respondents[2] demonstrates that they too have secured comparable services that "*directly* serve needs of human health and welfare." (Exec. Order No. 12404, emphasis supplied).

2. *See, e.g.*, J.A. 249, 252-4, 258.

Thus, to use the language of *Perry* (and unlike the parties in *Perry*) respondents share the same "status" as the organizations afforded entry to the CFC, *e.g.*, all are intent on achieving health and welfare benefits for individuals, whether by paying money directly from their coffers to beneficiaries or by utilizing their resources to obtain those benefits from the Government or other appropriate third parties.

The Government has, at an earlier date, acknowledged that legal defense funds are properly to be regarded as similarly situated with other health and welfare organizations. On March 23, 1982, the President issued Executive Order No. 12353, which specifically provided that legal defense funds would be included among organizations that provided health and welfare services and were thus entitled to participation in the CFC. With the final approval of regulations issued pursuant to that order, the U.S. Office of Personnel Management issued a press release declaring that it was OPM Director Donald Devine's judgment that ". . . some of the earlier criteria were overly restrictive," and that the proposed language had, in fact, been changed so as to make clearer that "legal defense, minority and women's organizations" *were* entitled to participate in the CFC (J.A. 86).[3] Thus, the circumstances surrounding the issu-

3. Section 950.101 of the regulations enacted pursuant to Executive Order No. 12353, 47 Fed. Reg. 29496 (1982), later replaced by the regulations enacted pursuant to Executive Order No. 12404, provided, in pertinent part, as follows:

> For purposes of this part: (a) the term "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" means national entities that:
>
> (1) Meet all eligibility requirements established in this Part, except as limited hereinafter;

(footnote continued on next page)

ance of Executive Order No. 12353 and related regulations seem to belie the Government's assertion that those enactments were undertaken only in response to court order, and without conceding the inappropriateness of the earlier criteria. Certainly, the pronouncements in connection with that issuance could have been made in more restrained fashion if that were the case.

It does not take too jaundiced an eye to speculate that where, as here, the Government differentiates between types of organizations which all serve the same health and welfare purposes, the underlying motive is not any difference between the purposes ultimately served by the agencies, but rather an inherent disfavor of resort to the courts to effect those purposes generally—because the result of those litigations, although resounding to the direct benefit of individuals, may ultimately cost the Government additional money. To allow the Government to attempt, in this indirect fashion, to avoid its obligations, would indeed be untenable.

None of the grounds asserted by the Government for denying respondents access to the CFC are "narrowly drawn to effectuate a compelling state interest," as is required when a content-based restriction is enacted with reference to a public forum. While not wishing to repeat

> (2) Are not "action" organizations within the meaning of 26 CFR 1.501(c)(3)-1(c)(3) and are eligible to receive tax deductible contributions under 26 U.S.C. 170; and
>
> (3) Provide or substantially support one or more of the following services:
>
> . . . (vii) Delivery of legal services to the poor and indigent, and defense of human and civil rights secured by law . . .

the discussion of this point set forth in the briefs of respondents and of fellow *amici*, the following should be noted regarding the statement of objectives which introduces Executive Order No. 12404.

With respect to the initial statement that the CFC is intended "to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; [and] to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail," it has already been shown that the legal defense funds advance the same health and welfare purposes as the organizations allowed access to the CFC. The Government has referred to the controversy engendered by the participation of certain legal defense funds in the CFC as justification for the challenged regulations. However, the mere fact that the views to be expressed by a party are controversial is insufficient to justify denial to that party of access to a forum. *Police Department* v. *Mosley,* 408 U.S. 92, 96 (1972). Thus, even treating the stated objectives as other than a *post hoc* rationalization, the desire to advance those purposes, and to enact rules that allow these purposes to be accomplished efficiently and without disruption, cannot justify, as compelling state interest, a regulation that bars respondents' participation in the CFC.

One is left, then, with the Government's assertion that the challenged regulations are necessary "to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare."

However, the CFC does not represent in "reality" or in "appearance" a use of Federal resources for "advocacy of public policy, lobbying or philanthropy of any kind that does not directly serve needs of human health and welfare." Firstly, if the objective is to avoid government identification with organizations that do not "directly serve needs of human health and welfare," this objective does not apply to the legal defense funds since they "directly serve" these needs. Secondly, the governmental incurrence of the costs necessary to allow access to a public forum involves only maintenance of an already created forum. These administrative costs cannot be compared to the very real subsidy which governmental allowance of a tax-deductible contribution represents, and, thus, do not constitute a "subsidy" sufficient to change the Government's First Amendment obligations with respect thereto. *Compare Regan* v. *Taxation with Representation of Washington,* 103 S. Ct. 1997 (1983), *with Widmar* v. *Vincent,* 454 U.S. at 272-3 and n.12. Thirdly, as to any "appearance" of governmental support, as the District Court noted, an appropriate statement of the CFC's neutral role, inserted by the Government in each soliciation package, would more than eliminate any danger of governmental identification with the soliciting organizations.

II. Whether the Combined Federal Campaign Is Regarded as a Public or a Nonpublic Forum, the Challenged Regulations Impermissibly Burden a Protected First Amendment Activity.

The Government's position is premised on the argument that the CFC should properly be regarded as a nonpublic forum. Even assuming, *arguendo,* that this position is correct, there is no question—and the Government so concedes (*see* Petitioner's Brief at 29 n.22 and 46 n.37)—

that the regulations which set standards for access to the CFC are subject to the equal protection obligations which are applicable to the Federal Government through the Fifth Amendment. Respondents' brief (not to mention the opinion of the Court of Appeals below) more than adequately demonstrates that the challenged regulations do not, in fact, bear that necessary reasonable relationship. *Amici* will not burden the Court with yet another statement of that point.

Rather, this point is addressed to an additional aspect of this matter which bears emphasis. Even if the CFC is to be regarded as a nonpublic forum, the standards to be applied in determining who shall have access thereto must, of course, be *legitimate* standards that do not give rise to an invidious discrimination. Where distinctions are made between individuals that impact on fundamental First Amendment rights, the Fifth Amendment requires that such distinctions be supported by compelling state interest and that they be narrowly drawn so as not unnecessarily to impede those interests. *See Shapiro* v. *Thompson,* 394 U.S. 618 (1969). The Government, in denying respondents access to the CFC solely because they have exercised the First Amendment right to associate for purposes relating to public-interest litigation, has selected an inappropriate standard and it has demonstrated no compelling state interest which justifies that selection.

That the activities in which respondents are engaged are constitutionally protected is beyond cavil. In *NAACP* v. *Button,* 371 U.S. 415 (1963), this Court held that, in the context of the NAACP's objectives of seeking legal redress for infringements of individuals' constitutionally guaranteed rights, that organization's litigative activities were

"modes of expression and association protected by the First and Fourteenth Amendments." In later decisions this Court clarified that *Button* had established the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *In re Primus,* 436 U.S. 412, 426 (1978), *quoting United Transportation Union* v. *Michigan Bar,* 401 U.S. 576 (1971).

While the Government has asserted that respondents have been excluded from participation in the CFC simply because they do not fall within the classification of "traditional health and welfare organizations", there is, as is shown in Section I, *supra,* no cognizable difference between respondents and the so-called "traditional" charities—except for respondents' exercise of the First Amendment rights recognized in *Button* and *Primus.* Were it not for that exercise of their constiutional rights they would be permitted access to the CFC, as are all other health and welfare agencies.

Clearly, if respondents have a First Amendment right to participate in the CFC that right cannot be conditioned by the Government on their abandonment (as least to the extent that it constitutes more than 15% of their expenditures, *see* 5 C.F.R. §950.101(a)(2)) of their right to engage in "litigation on behalf of others", at least in the absence of compelling state interest and a showing that the regulation has been drawn with appropriate narrowness. Given the fundamental nature of the latter right, this would be the appropriate standard regardless of whether the CFC is regarded as a public or a nonpublic forum.

Even if access to the CFC is, improbably, classified as a "benefit," rather than a "right," strict scrutiny would be appropriate. The principle that "the government may not deny a benefit for a person because he exercises a constitutional right" was enunciated as recently as *Regan* v. *Taxation With Representation,* 103 S. Ct. at 2001. In *Regan* the Court upheld the Internal Revenue Service's denial of a corporation's application for section 501(c)(3) status because that corporation's activities consisted of attempting to influence legislation, even though that activity was concededly protected by the First Amendment. The Court reasoned that the challenged Internal Revenue Code provision did not infringe upon or regulate any First Amendment activity, but, rather, simply constituted Congress' declination to pay for such activity. In reaching that holding, however, the Court specifically distinguished *Speiser* v. *Randall,* 357 U.S. 513 (1958), and *Perry* v. *Sindermann,* 408 U.S. 593 (1972), cases in which the Court found that "unconstitutional conditions" had been placed on activities protected by the First Amendment. This case fits the "*Speiser-Perry* model", *Regan,* 103 S. Ct. at 2001, much more closely than it does the "*Regan*" model.

In *Speiser,* California enacted a regulation which required anyone who wished to utilize a property tax exemption to sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. The Court held that the regulation was unconstitutional because "[t]o deny an exemption to claimants who engage in speech is in effect to penalize them for such speech." *Id.,* 357 U.S. at 518. In *Perry* v. *Sindermann,* the Court held that lack of a contractual or tenure right to

re-employment, taken alone, did not defeat a teacher's right to a hearing of his claims that a state college's nonrenewal of his contract was because of his criticism of the college's governing board. In so holding the Court stated that the teacher could not be denied a benefit on a basis that infringed his constitutionally-protected interest in free speech. *Id.,* 408 U.S. at 597.

Justice Blackmun specifically noted in his concurring opinion in *Regan* that the challenged tax provision was sustainable only because of the necessary assumption that the Internal Revenue Service, in enforcing the lobbying restrictions, required an organization qualified under section 501(c)(3) and its lobbying affiliate with tax exempt status under section 501(c)(4) only to be separately incorporated and to keep records adequate to show that the tax deductible contributions were not used to pay for lobbying. Any further restrictions, which would in effect prevent section 501(c)(4) organizations from lobbying explicitly on behalf of their section 501(c)(3) affiliates, "would extend far beyond Congress' mere refusal to subsidize lobbying . . . [and] would render the statutory scheme unconstitutional." *Id.,* 103 S .Ct. at 2005; *cf., Cammarano* v. *U.S.,* 358 U.S. 498, 513 (1959) ("Petitioners are not being denied a tax deduction *because* they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets . . .") (emphasis supplied).

In neither *Regan* nor *Cammarano* was the taxpayer restricted in any respect from carrying out its First Amendment right of lobbying by the challenged tax provisions. The instant case is clearly more akin to *Speiser*

and *Perry* v. *Sindermann*. Under the challenged regulations, respondents' access to Federal workers through the CFC is explicitly made contingent on whether respondents utilize their First Amendment right to litigate on behalf of others. Thus, there is an actual and undeniable restriction of access to Federal workers allowed to similarly-situated others—unlike *Regan* and *Cammarano* in which actual access of lobbyists to legislators was restrained not at all.

Nor would allowing respondents access to the CFC on this basis necessitate allowing similar access to *all* section 501(c)(3) organizations. With respect to a limited public forum, and *a fortiori* with respect to a nonpublic forum, the Government may limit access to groups sharing a common status, based upon a standard that is truly content-neutral. *Perry*, 460 U.S. at 45-6. As has been discussed, the challenged regulations, while they pretend to content-neutrality, in fact distinguish among organizations with common health and welfare purposes exclusively on the basis that certain of those organizations utilize a constitutionally-protected activity to achieve those purposes.

Accordingly, the challenged regulations are only sustainable if they are justified by compelling state interest and are sufficiently narrowly drawn. As has been discussed in Section I, *supra*, those regulations do not satisfy that standard and on that basis, were properly stricken.

Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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